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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 ANNETTE GREETIS,

12 Plaintiff,

13 vs.

14 NATIONAL CITY MORTGAGE;
15 NATIONAL CITY SERVICING,

16 Defendants.

CASE NO. 09cv1502 JM(JMA)

ORDER GRANTING IN PART AND
DENYING IN PART MOTION TO
DISMISS; GRANTING LEAVE TO
AMEND

17 Defendant PNC Bank, National Association (“PNC”), as successor by merger to National City
18 Bank, p.d.b.a. National City Mortgage (erroneously sued and served as National City Mortgage),
19 moves to dismiss all of Plaintiff’s claims contained in the First Amended Complaint (“FAC”) for
20 failure to state a claim. Plaintiff Annette Greetis opposes the motion. Pursuant to Local Rule
21 7.1(d)(1), this matter is appropriate for decision without oral argument. For the reasons set forth
22 below, the motion to dismiss is granted in part and denied in part. The court denies the motion to the
23 extent Plaintiff states a Qualified Written Request claim under RESPA. The motion to dismiss is
24 granted in all other respects. The court also grants Plaintiff 15 days leave to amend from the date of
25 entry of this order.

26 **BACKGROUND**

27 The FAC, filed on December 21, 2009 alleges two federal claims for violation of RESPA, 12
28 U.S.C. §2605 et seq. and the Truth In Lending Act (“TILA”), 15 U.S.C. §1601 et seq., and six state

1 law claims for violation of Cal. Bus. Prof. Code §17200, negligent misrepresentation, fraud,
2 rescission, quasi contract, and determination of validity of lien. Plaintiff also seeks an order enjoining
3 any foreclosure proceedings from continuing.

4 Plaintiff's claims arise from a mortgage provided by Defendants on August 8, 2006 for the
5 refinancing of the mortgages (first and second trust deeds) on his home located in Valley Center,
6 California. (FAC. ¶13). Defendant National City Bank is the originating lender for the transaction
7 and Defendant National City Servicing is the servicer of the loan. (Id. ¶¶2, 3). With respect to the
8 federal claims, Plaintiff alleges that Defendants violated RESPA by failing to adequately respond to
9 three Qualified Written Requests ("QWR") made on November 19, 2008, January 22, 2009 and
10 February 13, 2009 in violation of RESPA. (Id. ¶¶36-51). The QWRs broadly "requested information
11 including but not limited to: detailed charges for unpaid principal, interest, escrow, and other charges;
12 interest rate history; a full set of loan-related documents; name, mailing address, phone and fax
13 number of all current owners; documentation and proof of ownership for al owners; confirmation of
14 loan as purchase money, subprime, non-recourse; whether a deficiency would be sought after closure;
15 if the debt is considered an acquisition debt; reasons why any information is not confirmed; intentions
16 as to adverse actions and credit reporting." (Id. ¶¶39, 42, 45). The second portion of the RESPA
17 claim alleges that the HUD sample disclosure made prior to loan origination did not show the contract
18 sales price, amount paid to existing loans, the gross amount due from borrower, the correct interest
19 rate. (Id. ¶48). "As a proximate result of Defendants' breach of duty and all other actions as alleged
20 herein, Plaintiff has suffered severe emotional distress, mental anguish, harm ,humiliation,
21 embarrassment, and mental and physical pain and anguish." (Id. ¶51).

22 The TILA claim has two parts. First, Plaintiff seeks damages arising from allegations that
23 Defendants failed to accurately disclose the interest rate, the prepayment penalty in the calculation of
24 the APR, and accurate good faith estimates. (Id. ¶¶55-64). The second part of the TILA claim seeks
25 to rescind the contract pursuant to 15 U.S.C. §1635(a), based upon alleged misrepresentations
26 contained in TILA- related disclosures.

27 On December 1, 2009 the court granted Defendants' Rule 12(b)(6) motion and dismissed the
28 federal claims with leave to amend. The court did not address the state law claims, informing the

1 parties that the court would decline to entertain the state law claims until Plaintiff stated a federal
 2 claim. Plaintiff timely filed the FAC and Defendants once again move to dismiss all federal and state
 3 law claims for failure to state a claim. Plaintiff opposes the motion.

4 DISCUSSION

5 Legal Standards

6 Federal Rule of Civil Procedure 12(b)(6) dismissal is proper only in "extraordinary" cases.
 7 United States v. Redwood City, 640 F.2d 963, 966 (9th Cir. 1981). Courts should grant 12(b)(6) relief
 8 only where a plaintiff's complaint lacks a "cognizable legal theory" or sufficient facts to support a
 9 cognizable legal theory. Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990). Courts
 10 should dismiss a complaint for failure to state a claim when the factual allegations are insufficient "to
 11 raise a right to relief above the speculative level." Bell Atlantic Corp v. Twombly, ___550 U.S. ___, 127
 12 S.Ct. 1555 (2007) (the complaint's allegations must "plausibly suggest[]" that the pleader is entitled
 13 to relief); Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009) (under Rule 8(a), well-pleaded facts must do more
 14 than permit the court to infer the mere possibility of misconduct). "The plausibility standard is not
 15 akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has
 16 acted unlawfully." Id. at 1949. Thus, "threadbare recitals of the elements of a cause of action,
 17 supported by mere conclusory statements, do not suffice." Id. The defect must appear on the face of
 18 the complaint itself. Thus, courts may not consider extraneous material in testing its legal adequacy.
 19 Levine v. Diamanthuset, Inc., 950 F.2d 1478, 1482 (9th Cir. 1991). The courts may, however,
 20 consider material properly submitted as part of the complaint. Hal Roach Studios, Inc. v. Richard
 21 Feiner and Co., 896 F.2d 1542, 1555 n.19 (9th Cir. 1989).

22 Finally, courts must construe the complaint in the light most favorable to the plaintiff. Concha
 23 v. London, 62 F.3d 1493, 1500 (9th Cir. 1995), cert. dismissed, 116 S. Ct. 1710 (1996). Accordingly,
 24 courts must accept as true all material allegations in the complaint, as well as reasonable inferences
 25 to be drawn from them. Holden v. Hagopian, 978 F.2d 1115, 1118 (9th Cir. 1992). However,
 26 conclusory allegations of law and unwarranted inferences are insufficient to defeat a Rule 12(b)(6)
 27 motion. In Re Syntex Corp. Sec. Litig., 95 F.3d 922, 926 (9th Cir. 1996).

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1 The Federal Claims

2 The RESPA Claims

3 a. The QWR Claims

4 PNC argues that the QWR allegations are deficient in that the QWRs themselves are not
5 attached as exhibits to the complaint, the allegations are too conclusory, and Plaintiff fails to allege
6 any facts that there was a basis for a belief by her that the loan amount is in error as required by 12
7 U.S.C. §2605(1)(B)(i) - (ii). These arguments are not persuasive.

8 The court notes that there is no requirement that relevant documents be attached to a
9 complaint, nor does PNC cite any authority. The court further notes that the QWR letters are already
10 a part of the court's docket.¹ (Docket No. 14). Addressing the conclusory allegation argument and
11 upon review of the QWR allegations, the court concludes that the allegations, while not a model of
12 clarity, adequately apprise PNC of the nature of the claim asserted against it such that PCN can
13 prepare an adequate answer, conduct discovery, and prepare evidentiary-based motions as required.
14 The FAC identifies the dates of the QWR letters, broadly describes information sought regarding the
15 servicing of the loan as required by Regulation X, 24 C.F.R. §3500.21(e)(2), and alleges that
16 Defendants neither timely responded to the QWRs nor provided all the requested information. (FAC
17 ¶¶39, 42, 45). Nothing more is required to state a RESPA QWR claim. Lastly, the regulatory scheme
18 provides an alternative to alleging the borrower's belief that the mortgage servicing account is in error.
19 Regulation X provides that a QWR must include "a statement of the reasons that the borrower believes
20 the account is in error, if applicable, or that provides sufficient detail to the servicer regarding
21 information relating to the servicing of the loan sought by the borrower." 24 C.F.R. §3500.21(e)(2)
22 (emphasis added). Plaintiff satisfies the regulatory definition of a QWR by providing sufficient
23 information to PNC regarding the servicing of the loan.

24 In sum, the motion to dismiss the QWR claim is denied.

25 b. The RESPA HUD-1 Claim

26 PNC seeks dismissal of the RESPA claim based upon the Sample HUD-1 form provided to
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¹No party disputes the authenticity of these QWR letters.

1 Plaintiff at or before the time of closing.² (FAC ¶48; Greetis Decl. Exh. A). Plaintiff broadly alleges
 2 that the Sample HUD-1 form fails to disclose the “contract sales price, amounts paid to existing loans,
 3 gross amount due from borrower, gross amount paid by/for borrower,” (FAC ¶48), and to disclose “all
 4 the prepayment penalties in the calculation of the Annual Percentage Rate.” (*Id.* ¶50).³

5 PNC moves to dismiss this claim on several grounds. PNC persuasively argues that certain
 6 allegations of non-disclosure are not actionable. For example, Plaintiff alleges that PNC failed to
 7 disclose the “contract sales price” of the transaction. However, the underlying financial transaction
 8 consisted of a refinancing of earlier obligations, and did not involve the sale of real property. (FAC
 9 ¶48).⁴ Similarly, there appears to be no gross amounts to or from borrower as the refinancing paid off
 10 existing indebtedness. Prepayment penalties also need not be included as a settlement cost because
 11 they are contingencies which may never occur and need not be included in the calculation of the
 12 Annual Percentage Rate. Further, Plaintiff’s allegation that the HUD-1 does not “show essential
 13 numbers,” (FAC ¶48), fails to demonstrate facial plausibility to state a claim. *See Iqbal*, 129 S.Ct. at
 14 1949.

15 Lastly, the court notes two other failings with Plaintiff’s HUD-1 claim. First, it is unclear
 16 whether 12 U.S.C. §2603 provides a private right of action, *Morrison v. Brookstone Mortgage Co.,*
 17 *Inc.*, 415 F.Supp.2d 801 (S.D. Ohio 2005); *Bloom v. Martin*, 865 F.Supp. 1337, 1384 (N.D. Cal. 1994
 18 (“Congress did not intend to create a private right of action for disclosure violations under 12 U.S.C.
 19 §2603.”), and Plaintiff fails to address this argument. Second, the claims may be time-barred as the
 20 one year statute of limitations appears to apply to Plaintiff’s settlement claims. 12 U.S.C. §2614. The
 21 court notes that the one year statute, and not the three year statute, likely applies to Plaintiff’s
 22 settlement statement claims and would be consistent with TILA’s one year statute of limitation for

24 ² HUD-1 is a form provided to buyers and sellers disclosing settlement charges. 24 C.F.R. §
 25 3500.8(a) (1995). The “good faith estimate” is a summary provided to mortgage applicants of the costs
 26 they will incur or pay either at or before settlement. 24 C.F.R. §3500.7(c)(2).

27 ³ The court notes that Plaintiff argues that she never received a final HUD-1 and “only received
 28 the ‘SAMPLE’ HUD-1.” (Oppo at p.6:4-5).

⁴ The court questions the basis for Plaintiff’s information and belief that the underlying
 transaction involved the sale of real property.

1 violation of TILA. See 15 U.S.C. §1640(e).⁵

2 In sum, the court grants the motion to dismiss the RESPA claim based upon the HUD-1
3 without prejudice.

4 The TILA Claims

5 **a. The Damages Claim**

6 Here, there is no dispute that, absent equitable tolling, Plaintiff's TILA damages claims are
7 time-barred by 15 U.S.C. §1640(e). TILA's one year statute of limitation may be equitably tolled
8 where a defendant fraudulently conceals the existence of a claim or where, "despite all due diligence,
9 a plaintiff is unable to obtain vital information bearing on the existence of his claim." Santa Maria
10 v. Pacific Bell, 202 F.3d 1170, 1178 (9th Cir. 2000).

11 Here, the court dismisses the TILA damages claims because Plaintiff fails to adequately allege
12 either fraudulent concealment on the part of Defendants or that Plaintiff acted with reasonable
13 diligence in discovering the claim. Plaintiff simply fails to direct the court's attention to any
14 allegations in the FAC giving rise to the tolling of the statute of limitations. The conclusory allegation
15 that Defendants "fraudulently concealed facts upon which the existence of Plaintiff's claim for
16 negligent misrepresentation is based," (FAC ¶53), fails to particularly describe any wrongful conduct
17 on the part of Defendants. The court is also concerned that Plaintiff fails to allege that she acted
18 diligently in discovering any potential claim. Upon amendment, Plaintiff is instructed to set forth the
19 basis for equitable tolling of the statute of limitations.

20 In sum the court dismisses all TILA damages claims without prejudice.

21 **b. The Rescission Claim**

22 Plaintiff seeks rescission based upon allegations that Defendants failed to make required
23 disclosures pursuant to 15 U.S.C. §1635(a) and Regulation Z. (FAC ¶112). "In applying TILA, 'a
24 trial judge ha[s] the discretion to condition rescission on tender by the borrower of the property he had
25 received from the lender.'" Yamamoto v. Bank of New York, 329 F.3d 1167, 1171 (9th Cir. 2003)
26 (quoting Ljepava v. M.L.S.C. Props., Inc., 511 F.2d 935, 944 (9th Cir. 1974)). As explained in

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28 ⁵ Upon amending the complaint, the court requests that any further motion practice address the
court's concerns regarding the existence of a private right of action under 12 U.S.C. §2603 and
whether such an action is subject to a one or three year statute of limitations.

1 Yamamoto, the rescission provision of TILA, 15 U.S.C. §1635(a), and implementing regulation
2 Section 226.23 of Regulation Z,

3 provides that the borrower is not liable for any finance or other charge, and that any
4 security interest becomes void upon such a rescission. The statute adopts a sequence
5 of rescission and tender that must be followed unless the court orders otherwise: within
6 twenty days of receiving a notice of rescission, the creditor is to return any money or
property and reflect termination of the security interest; when the creditor has met
these obligations, the borrower is to tender the property.

7 329 F.3d at 1170. The Ninth Circuit held that the “statute need not be interpreted literally as always
8 requiring the creditor to remove its security interest prior to the borrower’s tender of proceeds.” Id.
9 at 1171.

10 Here, the court concludes that Plaintiff’s failure to allege that she is able to tender monies
11 received from Defendants is fatal to her claim for rescission. As noted in Yamamoto, the trial court
12 has the “discretion to condition rescission on tender by the borrower of the property he had received
13 from the tender.” Id. Because Plaintiff fails to allege that she is able to tender funds to PNC upon
14 rescission, the court grants the motion to dismiss.

15 Plaintiff also argues that she is entitled to rescind the transaction because Defendants failed
16 to make “all ‘material’ disclosures” required by 15 U.S.C. §1635(a). (FAC ¶112). In the absence of
17 additional factual allegations in support of the TILA rescission claim, the court concludes that Plaintiff
18 fails to raise the right to relief beyond the speculative level. See Iqbal, 129 S.Ct. at 1949. The motion
19 to dismiss the rescission claim is granted.

20 **The State Law Claims**

21 The court presently declines to reach the merits of Plaintiff’s state law claims until after
22 Plaintiff has had adequate opportunities to amend her federal claims.

23 In sum, the court dismisses all federal claims except the RESPA claim based upon the three
24 QWRs. As Plaintiff requests leave to amend, the court grants Plaintiff 15 days leave to amend from
25 the date of entry of this order. In the event that Plaintiff fails to state a claim for anything other than

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1 a QWR claim, the parties are advised that the court will request further briefing on whether the court
2 should exercise supplemental jurisdiction over the state law claims under 28 U.S.C. §1367.

3 **IT IS SO ORDERED.**

4 DATED: February 24, 2010

5 
6 Hon. Jeffrey T. Miller
United States District Judge

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